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75-6378

IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term, 1976

GEORGE JAMES PATTERSON, JR.,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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No. 76 -

GEORGE JAMES PATTERSON, JR.,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

Petition prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered on December 17, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at ___ N.C. ___, 220 S.E.2d 600 (1975), and is set out in appendix A hereto, pp. 1a-22a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of North Carolina was entered on December 17, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the exclusion for cause of Viniremen on the ground of their expressed attitude toward the death penalty violated petitioner's rights under the Sixth Amendment or Fourteenth Amendment to the Constitution of the Untited States by depriving Petitioner of a representative jury selected from a fair cross-section of the community?

3. Whether the denial by the Trial Court of Petitioner's motion, pursuant to G.S. Sec. 7A-454, to have a psychiatrist of his choice examine him to determine whether he was competent or sane at the time of the alleged offense and to determine whether he was competent to understand the nature of the charge against him and properly cooperate with his attorneys to present any defense to the charge violated this indigent petitioner's right to due process and equal protection of the law under the Sixth or Fourteenth Amendments to the Constitution of the United States?

4. Whether the Petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States were violated by the introduction into evidence by the State of Petitioner's alleged in custody confession?

5. Whether the Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States were violated by the failure of the Trial Court to fully and properly instruct the jury as to the concept of deliberation—— an essential element for a conviction of the charge of first degree murder?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> §14-17 (1969). "Murder in the first and second degree defined; punishment.- A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time or rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." 1/
>
> §15-187 (1965). "Death by administration of lethal gas.- Death by electrodution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."
>
> §15-188 (1965). "Manner and place of execution.- The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the supreintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

STATEMENT OF THE CASE

This is a petition for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolian, entered on December 17, 1975, affirming Petitioner's conviction and death sentence. Petitioner, George James Patterson, Jr., a fifty-two year old black man, was sentenced to die on February 7, 1974, in the Forsyth County Superior Court upon conviction for the first degree murder of his daughter, Mae Ruth Patterson, age twenty-three. 2/

At the trial, the State presented the Petetioner's mother, Lillian Mack Patterson, who testified that the deceased came to Petitioner's home after obtaining a conviction of the Petitioner of assault on her, which verdict Petitioner appealed, and the deceased did not live in the home. Later, according to her testimony, the Petitioner returned to his

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2/ Petitioner's sentence of death was imposed under N. C. Gen. Stat. §14-17, as construed by the Supreme Court of North Carolina in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). The North Carolina Legislature enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974), on April 8, 1974 which imposes the death penalty for first degree murder, but this statute provides that it is applicable to offenses committed after its ratification. The Supreme Court of North Carolina recently held, by a 4-3 vote, that this legislation was not retrospective and had no effect whatsoever on death sentences imposed under the Waddell decision, State v. Williams, N.C. Sup. Ct. No. 25 (Wake County, Spring Term 1975) (March 12, 1975), slip op. at 8-12. Accord: State v. Avery, N.C. Sup. Ct. No. 33 (Bertie County, Spring Term 1975) (March 12, 1975); State v. Lampkins, N.C. Sup. Ct. No. 11 (Forsyth County, Spring Term 1975) (March 12, 1975).

home and he and the deceased began arguing. The witness heard the deceased threaten to burn Petitioner's home up, along with his mother and him. The witness left the house and a couple of minutes later the Petitioner came out and told her to check on her granddaughter. The Petitioner left and this witness went to a neighbor's house and upon returning with the neighbor found her granddaughter dead. (R pp 44,45, and 46). Further, she testified that the deceased had been in and out of mental institutions since she was sixteen years old and the Petitioner "had not been right" since he had to have a plate placed in his head due to an assault (R pp 49,50).

The State also presented several other witnesses who testified regarding the condition of the body of the deceased and the action of the defendant at the time of his arrest. In addition, the State introduced evidence that the defendant was not questioned on the day of the killing due to his "mental condition" but officers Parker and Brown attempted to question him the next day, June 15, 1973, and the defendant, after calling an attorney, refused to make any statement. The State then introduced, over objection by the defendant an alleged statement or confession by the defendant, allegedly made on Sunday, June 17, 1973, stating that he had killed his daughter. No lawyer was present when this statement was taken.

The defendant did not testify and offered no evidence in this case.

At the conclusion of the evidence, the Court instructed the jury that it could return a verdict of first degree murder, second degree murder, manslaughter, or not guilty. The jury found Petitioner guilty of first degree murder and the Court thereupon sentenced him to die. On December 17, 1975, the Supreme Court of North Carolina affirmed Petitioner's conviction and sentence of death, with two justices dissenting in regard to the death penalty and one justice dissenting

in his instruction to the jury. The Court commended the case to the Parole Commission for consideration of a recommendation for executive clemency since the record disclosed that the trial judge agreed to accept a plea of guilty of manslaughter, which Petitioner refused to enter. On December 29, 1975, Chief Justice Susie Sharp stated execution on the judgment in order to allow a Petition for a Writ of Certiorari to be filed in this Court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner's Grouping of Exceptions and Assignments of Error in the Record on Appeal assigned as error the death sentence in this case because "[t]he imposition and carrying out of said penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to The United States Constitution." (Assignment of Error 4, R pp 112 and 113). The Supreme Court of North Carolina rejected this contention without discussion.[3/]

3/ Justices Sharp and Copeland in dissenting opinions stated:

> SHARP, Chief Justice (dissenting as to the death penalty):
>
> The murder for which defendant was convicted occurred on 14 June 1973, a date between 18 January 1973, the day of the decision in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated by Chief Justice Bobbitt in his dissenting opinion in State v. Jarrette, 284 N.C. 625, 666, 202 S.E.2d 721, 747 (1974)——an opinion in which Justice Higgins and I joined——, I dissent as to the death sentence imposed upon defendant by the Court below and vote to remand for the imposition of a sentence of life imprisonment. See also the dissenting opinion of Chief Justice Bobbitt, and my concurrence therein, in State v. Waddell, supra at 453 and 476, 194 S.E.2d at 30 and 47.
>
> COPELAND, Justice, dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 442, 437,212 S.E.2d 113, 122 (1975).

2. Petitioner in Argument No. 24 in his brief argued the Trial Court erred in excusing for cause by the State prospective jurors who:

> "[s]tated that they would not under any circumstances, regardless of the evidence, consider joining in a verdict, as a result of which the death penalty would be imposed; and in allowing prospective jurors to be excused for cause who stated that they did not believe in capital punishment without stating that under no circumstances would they vote for the death penalty in violation of defendant's rights under the United States and North Carolina Constitutions."

3. Petitioner's Grouping of Exceptions and Assignments of Error in the Record on Appeal assigned as error the Trial Court's denial of Petitioner's attorney's petition, pursuant to G.S. Sec. 7A-454, to have the indigent Petitioner examined by a psychiatrist of his choice to determine whether Petitioner was competent or sane on June 14, 1973, and whether the Petitioner was competent to understand the charge against him and properly cooperate with his attorney to present any defense to the charge. (Assignment of Error No. 3, R. 112). The Supreme Court of North Carolina, citing numerous Federal and State Court decisions, rejected this contention on its merits. (App. A. infra at 14a).

4. Petitioner's Grouping of Exceptions and Assignments of Error in the Record on Appeal assigned as error the introduction by the State of an alleged in custody statement or confession of Petitioner on the grounds that:

". . .said statement or confession was not voluntary and freely given after the defendant was in full understanding of his constitutional rights in that State's evidence was the defendant refused to sign the waiver of rights form because he said he would not sign anything he did not under-

stand and, if he did not understand his rights as read to him by the officers, he could not have intelligently waived the rights as guaranteed to him by the United States Constitutuion."

". . .the officers were aware that the defendant had obtained or attempted to obtain the services of attorney, George W. Braddy, that defendant did not waive the presence of Mr. Braddy, and the statement was taken prior to the time defendant had an opportunity to talk with or have Attorney Braddy present at the interrogation and the confession was not admissible against the defendant being in violation of defendant's rights as guaranteed him by the United States Constitution."

". . .the statement did not include the entire statement of the defendant and, from the inchoerence of defendant's testimony on voir dire and defendant's other actions during the trial, it is clear he could not have mude such a statement to the officers without the officers omitting some crucial points in the defendant's favor relevant to his defense."

Assignments of Error No. 14, R. 115; No. 15, R. 116 and; No. 16, R. 116. The Supreme Court of North Carolina rejected these contentions and held that the trial judge's findings that Petitioner's confession was voluntary and his waiver of constitutional rights the product of intelligence and understanding were supported by competent evidence and conclusive on appeal. (App. A. infra, 12a).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF VENIREMEN ON THE GROUND OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES BY DEPRIVING PETITIONER OF A REPRESENTATIVE JURY SELECTED FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

In order to avoid burdening the Court with lengthy and repetitious matter, Petitioner adopts the "Reasons for Granting the Writ" sections, respectively, of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974), at 11-51 (attached as Appendix B), and of the Petition for Writ of Certiorari to the Supreme Court of Florida, Hallman v. Florida, No. 74-6168 (filed March 11, 1975), at 72-78 (attached as Appendix C). On October 29, 1974, this Court granted certiorari in Fowler v. North Carolina, No. 73-7031 to consider similar arguments.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DENIAL BY THE TRIAL COURT OF PETITIONER'S MOTION, PURSUANT TO G.S. SEC. 7A-454, TO HAVE A PSYCHIATRIST OF HIS CHOICE EXAMINE HIM TO DETERMINE WHETHER HE WAS COMPETENT OR SANE AT THE TIME OF THE ALLEGED OFFENSE AND TO DETERMINE WHETHER HE WAS COMPETENT TO UNDERSTAND THE NATURE OF THE CHARGE AGAINST HIM AND PROPERLY COOPERATE WITH HIS ATTORNEYS TO PRESENT ANY DEFENSE TO THE CHARGE VIOLATED THIS INDIGENT PETITIONER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE SIXTH OR FOURTEEN AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

On October 16, 1973, Counsel for Petitioner filed a petition with the Trial Court requesting that it enter an order approving a fee to employ the services of a private psychiatrist of the Petitioner's own choice to examine him, and the petition was denied by Judge William Z. Wood on October 25, 1973 (R pp 14, 15). On November 15, 1973, Counsel renewed his petition, and Judge Frank M. Armstrong ordered that Petitioner by examined by Dr. Richard Proctor of the Bowman Gray School of Medicine but refused to allow Petitioner to select a psychiatrist of his choice to examine him.

It is respectfully contended that, if the Petitioner had not been indigent and had the funds to employ a private psychiatrist, he would have done so, thus he was denied rights an individual with funds could have had. Doctors, patricularly doctors of psychiatry, differ in their diagnosis and prognosis of patients, thus the Petitioner was denied due process and equal protection of the law by the refusal of the North Carolina Courts to allow him a psychiatrist of his choosing to determine whether he was competent or sane on June 14, 1973 (the date of the alleged crime) and whether he was competent to stand trial for the charge against him and properly cooperate with his attorney to present his defense to the charge in question.

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WERE VIOLATED BY THE INTRODUCTION INTO EVIDENCE BY THE STATE OF PETITIONER'S ALLEGED IN CUSTODY CONFESSION.

On the voir dire examination of Offiders D.B. Parker and G.D. Brown, the fact developed that these officers saw the Petitioner at the hospital on June 14, 1973, (the date of the alleged killing), but did not attempt to take his statement because of his mental state (R p 59). On Friday, June 15, 1973, the officers attempted to interrogate the Petitioner at the Forsyth County Jail, and, after advising him of his right to have an attorney, Petitioner requested to talk with Mr. George Braddy. After talking with Mr. Braddy on the phone, he refused to talk with the officers. (R p 60).

On Sunday, at approximately 11:30, June 17, 1973, the officers agin attempted to interrogate the Petitioner, and, at that time, took the alleged statement or confession which was introduced into evidence over objection (R pp 60, 61). The Petitioner refused to sign the waiver of rights form when asked to do so by the officers. He stated that he refused to sign the form because he would not sign anything unless he knew what it was (R pp 60, 67).

From the testimony of Reginald Moore, Forsyth Superior Court Reporter, it is clear that Sargeant D.B. Parker testified at the original trial of January 7, 1974 Criminal Session before Judge Armstrong (which ended in a mistrial) as follows:

"THE COURT: Mr. Reginald Moore is a Court Reporter and was present at the time the case was originally called for trial in the Superior Court first week of the January seven, seventy-four Criminal Session before Judge Armstrong. During that trial, you took down the testimony of Officer Parker?

A. Yes, sir. This was on voir dire, Your Honor.

THE COURT: Sergeant D.B. Parker.

Q. Mr. Moore, during that voir dire, did you——I would

like to you to read a portion of the statement by Sergeant Parker in response to my questions and I believe I was questioning Sergeant Parker with regard to a waiver of rights form. Do you have the official court record before you?

A. Yes, sir. I have my notes.

THE COURT: Go ahead and read what he said there.

A. This is on examination by Mr. Mitchell, Your Honor.

THE COURT: Of Sergeant D.B. Parker?

A. Yes, sir.

MR. MITCHELL: Is it normal procedure for you to have anybody you interrogate sign a waiver of rights?

A. Yes, sir, it is if he wishes to sign it.

Q. Mr. Patterson didn't sign a waiver of rights, did he?

A. No, sir. He refused to sign one.

Q. Isn't the reason he refused to sign it because you refused to give him the attorney he wanted?

A. No, sir. He said he just wouldn't sign anything.

Q. He wouldn't sign anything?

A. Not unless he knew what it was.
(Exception No. 73)

Those are the notes I took of the original trial January seven. I don't recall whether it was mistried or not." (R pp 66, 67)

Although at this trial, Officer Parker testified he didn't remember exactly the Petitioner's reason for refusing to sign the waiver of rights form, he would not deny that this was his testimony at the prior trial. (R p 60).

In MIRANDA v. ARIZONA, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966) the United States Supreme Court held that an accused is entitled to the assistance of counsel before he is questioned, and that any confession he makes while in exclusive police custody could stand only if the accused affirmatively and understandingly waived his constitutional rights, and the government bears a heavy burden in attempting to prove such a waiver.

In US v. PHELPS, 443 F 2d 246 (5 Cir, 1971), the United States Court of Appeals for the 5th Circuit, in an opinion vacating the judgment of the lower court and remanding the case for further evidentiary hearings to determine whether the defendant voluntarily waived his rights to remain silent, stated:

> "The government's next contention is that even if, as we have found, Phelps was entitled to the MIRANDA protections, he waived those rights. There may be some merit in this argument. In MIRANDA the court said: 'Once warnings have been given, the subsequent procedure is clear. If the individual indicated in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.' 384 US at 473-474, 86 S Ct at 1627. In the present case the record shows that immediately after the investigators discovered the illegal weapon, they properly warned Phelps of his rights. Phelps, while professing to understand and declining the assistance of a lawyer, indicated by his refusal to sign the waiver that he did not wish to waive his right to remain silent. The officers' interrogation, therefore, should have ceased at this point."

Another case in point is US v. RAMOS, 448 F 2d 399, (5 Cir, 1971). In this case, the court held that where defendants were warned of their rights to counsel and to remain silent and acknowledge that they understood their rights but refused to sign a printed waiver of rights and thereafter neither of the defendants voluntarily initiated any further conversation, government agents' refusal to terminate interviews violated the Supreme Court's mandate in the MIRANDA decision, and incriminating statements which agents elicited from defendants were inadmissible.

The North Carolina law, prior to October 30, 1971, pursuant to GS 7A-450, et seq required an indigent defendant, in order to waive his right to counsel, sign a written waiver of rights. Effective October 30, 1971, the legislature rewrote Sec 7A-457 and provided that such waiver could be made, either orally or in writing. However, the statute, within the spirit of MIRANDA, supra, required such waiver be made by a defendant after he was fully aware of his rights and of the consequences of the waiver taking into consideration the defendant's age, education, mental condition and the complexity of

Taking into consideration the aforementioned factors, Petitioner respectfully contends the State failed to establish that the defer[illegible] AFFIRMATIVELY and UNDERSTANDINGLY waived his constitutional rights. As pointed out in MIRANDA v. ARIZONA, supra, the government or State in the case presently before the court bears a heavy burden in attempting to prove such a waiver.

To support Petitioner's contention that the State has failed to meet this burden, Petitioner called to the attention of the Supreme Court of North Carolina the following factors:

(1) As to the complexity of the crime, Petitioner was charged with the crime of first degree murder.

(2) Petitioner is a fifty-two year old black male with a third grade education and suffers from organic brain syndrome, epilepsy, brain trauma and circulatory disturbance (R pp 11, 12).

(3) The crime ellegedly occurred on June 14, 1973, but, due to the Petitioner's mental state, the investigating officers did not attempt to take a statement. (R p 59).

(4) On June 15, 1973, the investigating officers attempted to interview Petitioner at the Forsyth County Jail but, after talking with attorney George Braddy, by phone, Petitioner refused to talke with the officers. (R p 60).

(5) On Sunday, June 17, 1973, at approximately 11:30 a.m., the investigating officers attempted to interview the Petitioner and allegedly took the statement or confession which was extremely damaging to Petitioner without counsel for the Petitioner being present even though said officers knew the Petitioner had attempted to obtain counsel. On this occasion, the Petitioner refused to sign a written waiver of rights because according to the State's own evidence, he would not sign anything unless he knew what it was. At all times between June 15, 1973 when the Petitioner refused to talk with the officers and June 17, 1973, when officers allegedly took the damaging statement, Petitioner was in custody and had not had

an opportunity to talk with Attorney Braddy, or any other attorney.

(6) Subsequent to June 17, 1973, Petitioner was determined to be indigent entitling him to a court appointed attorney and an attorney was appointed for him.

(7) Without the alleged confession, there was little, if any, evidence to convict the Petitioner of the crime charged.

Considering the above factors in light of MIRANDA vs. ARIZONA, supra, and subsequent decisions, it is respectfully submitted that the introduction of the confession by the State violated Petitioner's constitutional rights in that the Petitioner could not have intelligently waived his right to counsel if he did not understand his rights as read to him by the officers.

In addition, the State completely failed to prove that the Petitioner was not represented by Attorney George Braddy on June 17, 1973, when the alleged statement was taken by the officers. Failing to establish this fact, Petitioner contends that Judge Frank M. Armstrong was correct in his opinion as set out in the Order of Mistrial wherein he stated:

"It is the opinion of the Court that the admissibility of the written confession depends upon whether Mr. Braddy did represent the defendant and should have been called and allowed to be present when the defendant made his written confession, even though the officers testified that he waived the presence of counsel on June 17, 1973."

It was clear from the evidence on voir dire that the Petitioner informed the officers that he was represented by Mr. George Braddy and, in fact, on June 15, 1973, contacted Mr. Braddy in the presence of the officers. After talking with Mr. Braddy, Petitioner refused to make any statement to the officers. Further, the facts established that, according to the visitors' log in the Forsyth County Jail, Jr. George W. Braddy of 608 O'Hanlon Building, Winston-Salem, N.C., an attorney, visited inmate George Patterson at 3:15 p.m. on June 17, 1973

and at 10:30 a.m. on June 29, 1973 (R p 80). On July 26, 1973, (the time originally set for the preliminary hearing) Mr. George Braddy appeared on behalf of the Petitioner and presented an order to the Court to have the Petitioner committed for mental examination. (R p 66).

At the time the officers became aware that the Petitioner had obtained or was attempting to obtain the services of Mr. George W. Braddy, an attorney, and were informed by the Petitioner that he did not want to make a statement, it was a denial of the Petitioner's constitutional right to counsel for the officers to return and elicit the alleged statement before he had had an opportunity to confer with an attorney and arrange for him to be present at any interview with the investigating officers. ESCOBEDO vs. ILLINOIS, 378 US 478, 84 S Ct 1758, 12 L Ed 2d 997 (1964); US vs. CHILDRESS, 347 F 2d 448 (7 Cir, 1967); US vs. BLAIR, 470 F 2d 331 (1973); and US vs. HEDGEMAN, 368 F Supp 585 (1973).

For the aforementioned reasons, it is respectfully submitted that the record proper in the case presently before the court does not support the Trial Court's findings, which were upheld by the Supreme Court of North Carolina, that Petitioner's statement or confession was voluntary and his waiver of constitutional rights the product of intelligence and understanding and the introduction of the same into evidence against the Petitioner violated his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

V. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WERE VIOLATED BY THE FAILURE OF THE TRIAL COURT TO FULLY AND PROPERLY INSTRUCT THE JURY AS TO THE CONCEPT OF DELIBERATION——AN ESSENTIAL ELEMENT OF THE CHARGE OF FIRST DEGREE MURDER.

Justice Exum dissented and voted for a new trial on the ground that the trial judge failed to fully and properly instruct the jury on the concept of deliberation (App. A. infra, 17a-22a). This error was highly prejudicial and prevented Petitioner from receiving a fair trial on the charge of First Degree Murder and, under the circumstances, was a denial of due process and equal protection of the law in violation of the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX A

State v. Patterson, ____ N.C. ____, 220 S.E.2d 600 (1975).

In this connection it is well for us to look again at the insurance contract for guidance. Paragraph 19 of the contract provides, among other things, "[B]ut payment or tender of unearned premium is not a condition of cancellation." We have already observed that in Paragraph 20 it is provided that when cancellation is made for non-payment of premium, it "shall be deemed to have been made at the request of the named insured and shall be on a short rate basis."

Thus, the language of the insurance contract requires an answer favorable to the defendant. Our research fails to find any North Carolina decision directly in point, but in other jurisdictions where they were dealing with provisions similar to those in our case, the rule is that refund or tender of unearned premium is not a condition precedent to cancellation for non-payment of premium. Annot., 16 A.L.R.2d, 1200-1208. *See also* cases cited therein.

Furthermore, as we have stated, the facts of this case clearly negate estoppel or waiver. The policy was effectively cancelled on 22 July 1973, some six days prior to the occurrence of the loss at a time when there were no unearned premiums. Moreover, since the plaintiff was indebted to the defendant in the sum of $3.20 under the terms of the insurance contract, under no theory of the law could the check for $38.30 mailed on 27 July 1973 and postmarked at 1:00 p. m. on 28 July 1973, breathe life into an insurance contract that had been cancelled six days before. It was not enough to insert "July Payment" at the bottom of the check. Certainly the defendant had a right to cancel the policy when the premiums were not paid when due, and by the same token it had a right to state the conditions under which the policy could be kept in force. The assignment of error is overruled.

Rule 56(c) of Chapter 1A-1 of the General Statutes provides in part as follows: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* . . . ." (Emphasis supplied.) The district court operating under the provisions of Rule 56 determined that there was no *genuine issue as to any material fact between the parties* in this case. For all the reasons above indicated, we conclude that the decision of the district court is correct and that the decision of the North Carolina Court of Appeals should be

Affirmed.

STATE of North Carolina

v.

George James PATTERSON, Jr.

No. 76.

Supreme Court of North Carolina.

Dec. 17, 1975.

The Forsyth County Superior Court, John D. McConnell, J., found defendant guilty of the first-degree murder of his daughter, and he appealed. The Supreme Court, Moore, J., held that (1) there was sufficient evidence to carry the case to the jury on the issues of premeditation and deliberation, (2) an oral waiver by defendant of his constitutional rights was shown by the evidence, notwithstanding defendant's refusal to sign written waiver form, (3) while it was improper to permit the interrogating officers to testify that "in their opinion" defendant understood his rights, the error was harmless beyond a reasonable doubt, (4) admitting that portion of defendant's confession relating to other proceedings which resulted in an 18-month sentence being imposed upon him for an assault was not improper, as such evidence

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tended to prove a motive on his part to commit the homicide, (5) even assuming that attorney's representation of defendant on the assault charge continued through the date defendant confessed to murder, there was no denial of his right to counsel in the murder case, and (6) the indigent defendant, after being provided at state expense with two psychiatric experts whose findings did not suggest that he was legally insane or incompetent to stand trial, and whose competency and standing in their profession were not challenged, was not entitled by reason of constitutional due process or equal protection to have the State furnish him still another psychiatrist selected by him.

No error.

Sharp, C. J., and Copeland and Exum, JJ., dissented with opinions.

1. Homicide ⇐269

In prosecution of defendant for the first-degree murder of his daughter, there was sufficient evidence to carry the case to the jury on the issues of premeditation and deliberation, including evidence of previously existing hostile feelings between defendant and his daughter, a prior assault upon her by defendant, the use of grossly excessive force, the unusually brutal way in which the killing occurred, and the probability of a revenge motive.

2. Homicide ⇐232

Premeditation and deliberation elements of first-degree murder are not usually susceptible to direct proof, but must be established, if at all, from the circumstances surrounding the homicide.

3. Homicide ⇐23(1)

Murder in the first degree is the unlawful killing of a human being with malice, premeditation and deliberation.

4. Homicide ⇐23(1)

If defendant resolved in his mind a fixed purpose to kill his daughter and thereafter, because of that previously formed intent and not because of any legal provocation on her part, deliberately and intentionally killed her with a meat cleaver, a deadly weapon, the three essential elements of murder in the first degree—premeditation, deliberation and malice—occurred.

5. Homicide ⇐230, 232

Plenary evidence supported jury's finding that defendant, motivated by ill will and express malice towards his daughter because of her prosecution of him in district court on an assault charge, intentionally killed her; evidence that he gave her 15 minutes to leave the house, that he went into kitchen and got meat cleaver, and that, at the expiration of 15 minutes, he struck her numerous blows so that her head was "partially off" tended to show premeditation and deliberation as well as malice.

6. Criminal Law ⇐1158(4)

As the trial judge's findings, relative to the voluntariness of defendant's confession, were amply supported by competent evidence, and as his conclusions and determination of the admissibility of the confession were, likewise, supported by his findings, his consequent ruling that the confession was admissible would not be disturbed on appeal, notwithstanding that there might be evidence from which a different conclusion could be reached.

7. Criminal Law ⇐412.2(5)

Refusal to sign a written waiver of rights is a fact which may tend to show that no waiver occurred, but it is not conclusive in the face of other evidence tending to show waiver.

8. Constitutional Law ⇐43(1)

There is no constitutional requirement that a waiver of constitutional rights be in writing.

9. Criminal Law ⇐412.2(5)

Evidence that defendant, on the day after his arrest, told police sergeant "he

would tell us what we wanted to know, but not then," that, two days later, defendant replied affirmatively when asked "if he wanted to tell us what happened" and then stated that "he didn't want an attorney, but he wanted to call his daughter," and that, after using the telephone, he sat back down and said he was ready to talk was sufficient to show an oral waiver by defendant of his constitutional rights, notwithstanding his subsequent refusal to sign written waiver form.

10. Criminal Law ⇐412.2(5)

A refusal to sign a waiver form does not necessarily preclude a valid oral waiver of rights.

11. Criminal Law ⇐1169.9

While it was improper to permit interrogating officers to testify at trial that "in their opinion" defendant understood his constitutional rights, the error was harmless beyond a reasonable doubt, since there was other competent evidence of defendant's understanding.

12. Criminal Law ⇐412.2(3)

Whether a defendant understood warnings as to his constitutional rights is a question of fact which is capable of being proved and therefore must be proved, if at all, by his actual responses, verbal or otherwise, to the explanations given him of his rights.

13. Criminal Law ⇐448(1)

Opinion testimony is inadmissible whenever the witness can relate the facts so that the jury or trier of fact will have an adequate understanding of them and is as well qualified as the witness to draw inferences and conclusions from the facts.

14. Criminal Law ⇐448(3)

While lay opinion of the mental capacity of another is admissible in many instances, generally a witness may not give his opinion of another person's "intention" on a particular occasion.

15. Criminal Law ⇐448(3)

A witness may not give an opinion as to whether a defendant in a criminal case understood his rights, but must instead detail the facts upon which the opinion rests.

16. Criminal Law ⇐260.11(3)

Where the court is the trier of facts, in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence.

17. Criminal Law ⇐696(7)

Where only a portion of a witness' testimony is incompetent, the party moving to strike should specify the objectionable part and move to strike it alone.

18. Criminal Law ⇐371(12)

Where evidence tends to prove a motive on the part of the accused to commit the crime charged, it is admissible, even though it discloses the commission of another offense by the accused.

19. Criminal Law ⇐371(12)

In prosecution of defendant for murdering his daughter, it was not improper to admit into evidence that portion of defendant's confession from which the jury could have found that, in defendant's mind, he had, on the very day the homicide occurred, been sentenced to 18 months because of lies told in court by his daughter earlier that day relative to an assault charge.

20. Criminal Law ⇐517.2(1)

Even assuming that attorney's representation of defendant on assault charge continued through the date defendant confessed to murder, there was no denial of defendant's right to counsel in the murder case, where it was found on competent evidence that defendant intelligently waived his right to counsel prior to confessing.

21. Criminal Law ⇐641.4(1)

A defendant may waive the presence of an attorney in a case under investigation when the attorney represents him on an unrelated charge.

22. Criminal Law ⇐641.12(3)

Statute providing that "the court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person" permits but does not compel providing an expert to a criminally accused at state expense. G.S. § 7A-454.

23. Constitutional Law ⇐250.2(5), 268.2(2)

Indigent defendant who was accused of murder and provided with two psychiatric experts at state expense, whose findings did not suggest that defendant was or had been legally insane or that he was incompetent to stand trial, and whose competency and standing in their profession were not challenged, was not entitled by reason of constitutional due process or equal protection to have the State furnish him still another psychiatrist selected by him. G.S. § 7A-454.

24. Constitutional Law ⇐250.2(5)

An indigent defendant, on a proper showing of reasonable need, is entitled by reason of constitutional equal protection to no more than having the state furnish competent psychiatric assistance; he is not entitled to have the court appoint a psychiatrist of his own choosing.

25. Criminal Law ⇐438(5)

Since, in a murder case, premeditation and deliberation may be proved circumstantially by showing the use of grossly excessive force or the brutal manner of the killing, the trial court did not abuse its discretion in allowing into evidence two properly authenticated photographs of the deceased, who was struck in the face, neck and head by a meat cleaver, notwithstanding defense counsel's stipulation as to the cause of death.

26. Witnesses ⇐414(2)

Prior consistent statements of a witness are admissible to strengthen his credibility; such evidence is admissible not only to rebut the implications arising from testimony as to prior inconsistent statements, but also where the witness' veracity has been impugned in any way.

27. Witnesses ⇐414(2)

If previous statements offered in corroboration of a witness' testimony are generally consistent with such testimony, slight variations between them will not render the statements inadmissible; such variations affect only the credibility of the evidence which is always for the jury.

28. Criminal Law ⇐1170½(1)

Trial judge's refusal to strike a neighbor's testimony offered to corroborate the testimony of defendant's mother was not prejudicial error, where the neighbor's testimony, in the context of all the evidence, was not inconsistent with, and not contradictory to the testimony of defendant's mother, and where there was at most a slight variance which, considered with all the evidence, could not possibly have prejudiced defendant.

29. Criminal Law ⇐1159.2(9), 1159.4(1)

The Supreme Court on an appeal in a criminal action only reviews matters of law or legal inference, it not being the function of the Court to pass upon the credibility of witnesses or to weigh their testimony. Const. art. 4, § 12(1).

30. Homicide ⇐345

Since the record disclosed that the trial judge agreed to accept a plea of guilty of manslaughter, which defendant refused to enter, following which he was tried and convicted of first-degree murder and sentenced to death, the case would be commended by the Supreme Court to the parole commission for consideration of a recommendation for executive clemency.

Upon an indictment proper in form, defendant was convicted of murder in the first degree of his daughter, Mae Ruth Patterson (Mae Ruth), and sentenced to death. This case was docketed and argued as No. 31 at the Spring Term 1975.

Mae Ruth was found murdered in the residence of defendant and his mother (Mrs. Patterson) in Winston-Salem, North Carolina, on 14 June 1973 by Mrs. Patterson and a neighbor, Viola Suber. Defendant was charged with the crime and arrested on 14 June 1973. Sergeant D. B. Parker of the Winston-Salem Police Department, on Friday, 15 June 1973, tried to get a statement from him; but after being advised of his rights, defendant refused to make a statement. Sergeant Parker and Sergeant Brown, also of the Winston-Salem Police Department, again questioned defendant on Sunday, 17 June 1973, and obtained a signed confession.

On 26 July 1973, the Forsyth District Court, finding that the court "has cause to believe that the defendant may not be competent to stand trial," ordered defendant committed to Cherry Hospital, Goldsboro, North Carolina, for observation. There, Dr. E. V. Maynard, Regional Director of Forensic Psychiatry, reported defendant to be "Without Psychosis (Not Insane)" and further reported, in pertinent part, as follows:

> "The examinations, observation and testing performed in his hospital have revealed no evidence of insanity, nor any serious mental disorder which might interfere with this defendant's competency to stand trial. He does, however, suffer from an organic brain syndrome, non-psychotic, (not insane) with epilepsy, brain trauma, and circulatory disturbance. This condition does impair the defendant's ability to control the involuntary movements of his body but in no way should it interfere with his ability to stand trial to the charge of murder.
>
> "Mr. Patterson has demonstrated to this staff the capacity to comprehend his position and to understand the nature and object of the proceedings against him . . . [and] the capacity to conduct his defense in a rational manner and to cooperate with his counsel to the end that any available defense may be interposed. . . ."

Defendant was discharged on 12 September 1973 and returned to Forsyth County for trial.

On 16 October 1973, defendant's court-appointed counsel, Mr. Mitchell, moved pursuant to G.S. 7A-454 for an order approving a fee to employ a private psychiatrist of defendant's choice for the purpose of further inquiry into defendant's sanity on "June 19 [sic], 1973," and his mental competency to stand trial. Although this motion was denied by Judge Wood on 25 October 1973, a similar motion by defendant was again filed on 15 November 1973. Judge Armstrong, then presiding, after finding "that one of the crucial questions involved in the action is whether the defendant was competent or sane on the day of the alleged crime and whether the defendant is presently competent to stand trial," ordered that defendant be examined by Dr. Richard Proctor, a psychiatrist at the Bowman Gray School of Medicine. Dr. Proctor, in a written report dated 23 November 1973, found defendant did have evidence of "organic brain damage and has had epileptic type seizures in the past," but also found that:

> "There was no evidence of any psychotic thinking. He was controlled and his responses in the main were appropriate except for evasion.
>
> . . . . . .
>
> ". . . [T]his individual is able to understand the charges preferred against him and to participate in his own defense. He is competent and capable . . . of standing trial."

The case was first called for trial before Judge Armstrong on 8 January 1974. During this trial, the State attempted to offer in evidence defendant's signed confession. Judge Armstrong believed that the admissibility of this confession depended upon whether defendant was in fact represented by counsel, a Mr. Braddy, at the time the statement was made and that defendant should have the benefit of the testimony of Braddy on this question. Upon learning that Braddy was confined to a hospital in

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Elizabethtown, North Carolina, and unable to testify, Judge Armstrong, with defendant's consent, declared a mistrial and remanded defendant to jail.

The case again came on for trial before Judge McConnell on 5 February 1974. Other than defendant's signed confession, the evidence against him was essentially the testimony of Mrs. Patterson and the investigating police officers. Mrs. Patterson's testimony tended to show the following: On 14 June 1973, Mae Ruth appeared in the Forsyth County District Court to prosecute a warrant against defendant alleging that he earlier had assaulted her. Defendant told Mrs. Patterson that he had recently shot a gun through a door to Mrs. Patterson's bedroom which Mae Ruth and a man were occupying at the time. (Her testimony does not make clear whether the shooting or some other incident was the basis for the assault charge.) After court, Mae Ruth returned to the residence and went to the bedroom of defendant. When defendant and Mae Ruth began arguing, Mrs. Patterson left the house. Later, defendant came out of the house and told Mrs. Patterson to "[g]o in there and see about Princess [referring to Mae Ruth]." Mrs. Patterson got her neighbor, Mrs. Suber, to go with her into the house. They found Mae Ruth lying on Mrs. Patterson's bed apparently dead. Winston-Salem police officer T. L. Reavis testified that after being called to the scene and learning what had happened, he searched the neighborhood for defendant and found him about 1:00 p. m. drunk and drinking wine in an alley near his residence.

Defendant's signed confession, admitted into evidence, was reproduced in the record as follows:

"He left court about 10:30 Thursday morning. The judge had sentenced him to eighteen months for protecting his house against Mae Ruth. He had Attorney Bruddy appeal the case. He stopped at the AID Drugstore and bought two packs of cigarettes, went to Cherry Street and caught a taxi home. When he paid the taxi driver, his mother was on the front porch waiting. She told him Mae Ruth was in the bedroom. He told Mae Ruth to open the door and she told him she was in bed. He told her to open the door and she did. He told her to get out and never come back in so she went and got in bed in her grandmother's bed. He said he was so confused about the lies she told in court that he went in her grandmother's bedroom. Mae Ruth started talking back to him, and his mother told them to lower their voices. Mae Ruth was backtalking and cursing him. He told her to leave the house, and she wouldn't. He told her he would give her fifteen minutes to get out. He said he had a watch on and when the fifteen minutes were up, she was still arguing. He took the meat cleaver. He said, 'Just say I killed her.'"

With regard to the meat cleaver, Sergeant Parker testified: "He said he got it out of the kitchen. We never found it. He said he washed it off after killing Mae Ruth, stuck it under his coat and threw it in some vines off of King Street Alley. There are thick weeds and vines that grow five or six feet high in that area."

It was stipulated that the deceased died from "massive blood loss from deep incerations of the face, neck, and head caused by a sharp, heavy instrument."

Defendant offered no evidence.

Atty. Gen. Robert Morgan and Asst. Atty. Gen. Ralf F. Haskell, Raleigh, for the State.

Fiddie C. Mitchell, Winston-Salem, for defendant-appellant.

MOORE, Justice.

[1, 2] Defendant [illegible] urges there was insufficient evidence to carry the case to the jury on the issues of premeditation and deliberation and the trial court erred in not allowing his motion for a nonsuit on the first degree murder charge. Taking the evidence in the light most favor-

able to the State, we find sufficient evidence to permit a jury to find premeditation and deliberation. These elements of first degree murder are not usually susceptible to direct proof, but must be established, if at all, from the circumstances surrounding the homicide. *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975); *State v. Sanders*, 276 N.C. 598, 174 S.E.2d 487 (1970), *rev'd on other grounds*, 403 U.S. 948, 91 S.Ct. 2290, 29 L.Ed.2d 860 (1971); *State v. Faust*, 254 N.C. 101, 118 S.E.2d 769 (1961), *cert. den.*, 368 U.S. 851, 82 S.Ct. 85, 7 L.Ed.2d 49 (1961). Previously existing hostile feelings between defendant and deceased, *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652 (1969); a prior assault upon the deceased by defendant, *State v. Gaks*, 240 N.C. 319, 82 S.E.2d 80 (1954); the use of grossly excessive force, *State v. Buchanan*, *supra*, and killing in an unusually brutal way, *State v. Watson*, 222 N.C. 672, 24 S.E.2d 540 (1943), have all been held to be circumstances tending to show premeditation and deliberation. There was evidence here of these circumstances and, in addition, evidence of revenge as a probable motive.

[3, 4] Murder in the first degree is the unlawful killing of a human being with malice, premeditation and deliberation. *State v. Moore*, *supra*; *State v. Faust*, *supra*. If defendant resolved in his mind a fixed purpose to kill his daughter and thereafter, because of that previously formed intent and not because of any legal provocation on her part, deliberately and intentionally killed her with a meat cleaver, a deadly weapon, the three essential elements of murder in the first degree—premeditation, deliberation, and malice—occurred. "Malice is not only hatred, ill will or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922). Malice exists as a matter of law "whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance." *State v. Baldwin*, 152 N.C. 822, 829, 68 S.E. 148, 151 (1910).

[5] The record here contains plenary evidence from which the jury could find that defendant, motivated by ill will and express malice toward his daughter because of her prosecution of him in district court, intentionally killed her. All the following evidence—that he gave her fifteen minutes to leave the house, that he went into the kitchen and got the meat cleaver, and that at the expiration of fifteen minutes struck her numerous blows so that her head was "partially off. There was a very deep laceration about her neck . . . others under her chin and about her face"—tended to show premeditation and deliberation as well as malice. Hence, defendant's motions for nonsuit were properly overruled.

Defendant next contends it was error to admit into evidence his 17 June confession. Pertinent evidence on this question was as follows:

Sergeant Parker first attempted to question defendant at the Forsyth County Jail on 15 June 1973. He advised defendant fully of his rights as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Before the jury, Sergeant Parker testified that defendant "indicated" that he understood his rights. Parker said:

> " . . . After we advised him, he wanted to call his attorney, Mr. Brandy. He talked with someone on the phone and told us he would tell us what we wanted to know, but not then. The next time we attempted to question him was on the seventeenth at the county jail, then at the detective office."

Sergeant Parker and Sergeant Brown at the jail on 17 June 1973 again asked defendant if he wanted to talk. Parker testified:

> "He said he wanted to talk to us, so we took him across the street. We again advised him of his Constitutional Rights on June 17, 1973."

In response to a question as to whether in his opinion defendant then understood his rights, Sergeant Parker testified over objection:

"In my opinion, he understood them. He indicated that he did. We did not threaten him. We simply asked him if he wanted to tell us what happened, and he said he did. He said he wanted to call his daughter. He used the phone."

At this point the jury was excused and a *voir dire* hearing conducted to determine the admissibility of the confession. During this hearing Sergeant Parker again testified that in his opinion defendant understood his rights. With regard to the statement itself, Sergeant Parker said:

". . . We wrote it down, read it back to him, had him read it, and he signed it. He made two corrections; one on page two adding 'in my room' and on page three adding 'my,' my house, then he signed it. Sergeant Brown and myself witnessed his signature on each page. When he corrected it, I read it to him—he read it himself. There were no promises made or threats made while we took the statement by anyone."

Sergeant Parker, on cross-examination, admitted that on 17 June defendant "refused to sign the waiver of rights after we had advised him of his rights. . . . He said he did not want a lawyer, but wanted to call his daughter. He then made a voluntary statement, and didn't ask us to stop at any time." When asked whether defendant refused to sign the waiver because he didn't understand it, Sergeant Parker said he would not deny this but that he did not remember exactly defendant's reason for refusing. He testified that they read and reread the written waiver to defendant and "when we asked him did he understand it, he said, 'Yes.' We asked him to sign it, and he refused."

Sergeant G. D. Brown also testified on *voir dire* that on 17 June 1973 Sergeant Parker advised defendant of all of his rights as required by *Miranda*, fully detailing them. When asked on direct examination whether in his opinion defendant understood his rights, Sergeant Brown testified:

"I believe he understood. He didn't want an attorney, but he wanted to call his daughter. He said he understood the rights. I was present while Sergeant Parker did the interrogating and wrote it down. After it was completed, Sergeant Parker read the statement back to Mr. Patterson, then Mr. Patterson read it and made a couple of corrections. Then he signed it. We witnessed his signature. There were no threats or promises made at any time.

. . . . . .

"The interrogation lasted about an hour. It does not contain everything that Mr. Patterson said, just the general basis of it."

During cross-examination the court asked Sergeant Brown, "Did he say he wanted to go ahead and make a statement?" Brown replied, "Yes, sir, he did. He made the phone call and after he did, he sat back down and said he was ready to talk to us."

Defendant's evidence on *voir dire* was to this effect: Jim Moore, a deputy clerk of court, testified that he was present at defendant's preliminary hearing on 26 July 1973, and that Mr. George Bradley appeared then on behalf of the defendant as his attorney and presented an order to send defendant for a mental examination. Mr. Reginald Moore, official court reporter in Forsyth County, testified that he reported defendant's trial before Judge Armstrong in January 1974. His official record of the trial proceeding indicated that Sergeant D. B. Parker had testified as follows:

"Q. Mr. Patterson didn't sign a waiver of rights, did he?

"A. No, sir. He refused to sign one.

"Q. Isn't the reason he refused to sign it because you refused to give him the attorney he wanted?

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"A. No, sir. He said he just wouldn't sign anything.

"Q. He wouldn't sign anything?

"A. Not unless he knew what it was."

Mr. Curtis Todd, an attorney practicing in Winston-Salem, testified that he had represented defendant in the past and that he talked with defendant "shortly after the alleged occurrence by telephone from City Hall or the jail. He wanted me to come down there and talk to him but I told him I could not."

Defendant testified essentially that after being "questioned" about his constitutional rights he did not make a statement because he wanted an attorney present. He asked for lawyer George W. Braddy "but Sergeant Parker said he didn't know him, so I asked for another lawyer." Sergeant Parker wouldn't let him call another one because Parker wanted him to sign the rights waiver. Two or three days later, the officers took him across the street where he then refused to sign the waiver because he didn't have a lawyer present, stating, "I wanted Attorney Braddy present before I signed anything." Braddy had represented him in his assault trial on 14 June and visited him at the jail on 16 June for the purpose of collecting a balance due on Braddy's fee. On Sunday morning, 17 June, Sergeant Parker asked him if he wanted any other lawyer and he replied that he would like to call Curtis Todd who had handled a civil matter for him earlier and whose number he knew. Sergeant Parker called and talked with Todd, and then allowed defendant to talk with Todd. Defendant testified, "They forced a statement out of me," and that he, in fact, did not sign the statement.

Curtis Todd, being recalled, testified defendant called him twice and one time could have been on a Sunday when defendant was in custody. Todd said, "I know he was in custody because the officer did get me and put him on the phone."

Defendant offered the visitor's log of the Forsyth County Jail which showed that Mr. George W. Braddy, an attorney practicing at 608 O'Hanlon Building, Winston-Salem, visited defendant at 3:15 p. m. on 17 June 1973 and at 10:30 a. m. on 29 June 1973.

It was stipulated that the signed confession was obtained at 11:30 a. m. on 17 June 1973.

Upon this evidence Judge McConnell found, in pertinent part:

(1) On 15 June, when first questioned by Sergeant Parker, defendant asked to call his lawyer, Mr. Braddy, used the telephone, and then stated "he would talk to them later, but did not wish to make any statement at the time."

(2) On 17 June, after being duly advised of his rights pursuant to *Miranda*, defendant "stated that he did not want an attorney, but would like to talk to his daughter and that he was given the phone and talked to someone and thereafter, he freely and voluntarily made a statement which has been identified by Officers Parker and Brown."

(3) On 17 June, "the defendant said he did not want to sign a waiver of his rights, but did make a statement freely and voluntarily after being advised of his rights and after stating that he did not want an attorney present."

(4) "That the defendant appears to be intelligent, above average intelligence and that he was coherent and appeared to understand what he was saying and, after the statement was written down it was read to him and he himself appeared to read it and made certain corrections."

Upon these findings, Judge McConnell concluded:

"... statement made by the defendant was made voluntarily, knowingly, and independently and that the defendant was in full understanding of his Constitutional Rights to remain silent and the rights to counsel and all other rights and, in fact, stated

that he did not want a lawyer . . . that he purposely, freely, knowingly, and voluntarily waived each of the rights which had been read to him on several occasions by the two officers and thereupon made a statement to the officers which shall be introduced into evidence over the objection of the defendant."

[6] Judge McConnell's findings are amply supported by competent evidence. His conclusions and determination of admissibility are, likewise, supported by his findings. His ruling, consequently, that the confession is admissible will not be disturbed on appeal notwithstanding that there may be evidence from which a different conclusion could be reached. *State v. Simmons*, 286 N.C. 681, 213 S.E.2d 280 (1975); *State v. McRae*, 276 N.C. 308, 172 S.E.2d 37 (1970); *State v. Gray*, 268 N.C. 69, 150 S.E.2d 1 (1966), *cert. den.*, 386 U.S. 911, 87 S.Ct. 860, 17 L.Ed.2d 784 (1967).

Nevertheless, defendant contends, with regard to the confession: first, his refusal to sign a written waiver precluded a finding of waiver; second, it was error to permit the investigating officers to testify as to their "opinion" of defendant's understanding of his rights; third, at least that portion of the confession relating to the district court proceedings resulting in an eighteen months' sentence being imposed upon defendant was inadmissible inasmuch as it tended to show the commission of another criminal act; and fourth, defendant was in fact represented by counsel at the time his confession was taken which, itself, precluded its admissibility.

To support his first contention defendant relies strongly on *United States v. Nielsen*, 392 F.2d 849 (7th Cir. 1968). In this case the defendant was warned of his rights before questioning by an FBI agent. He read a statement of his rights contained in a waiver form and said, "I am not going to sign this document. I have an attorney . . . and I am not signing anything, including this form, until I have occasion to talk to [the attorney]." The defendant told the agent, however, that questioning could continue. Holding that defendant's negative responses to certain questions then asked him by the agent were not admissible, the Seventh Circuit said:

"Here the defendant's refusal to sign the waiver form, followed by an apparent willingness to allow further questioning, should have alerted the agents that he was assuming seemingly contradictory positions with respect to his submission to interrogation. Instead of accepting the defendant's equivocal invitation, the agents should have inquired further of him before continuing the questioning to determine whether his apparent change of position was the product of intelligence and understanding or of ignorance and confusion." *Id.* at 853.

Thus, defendant argues that his refusal to sign the waiver form makes his confession the product of "ignorance and confusion," inadmissible under the rationale of *Nielsen*.

[7-9] Refusal to sign a written waiver is a fact which may tend to show that no waiver occurred. It is not conclusive in the face of other evidence tending to show waiver. There is no constitutional requirement that the waiver be in writing. "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." *Miranda v. Arizona*, *supra*, 384 U.S. at 475, 86 S.Ct. at 1628. Our statute expressly permits oral waiver. G.S. 7A-457(c). Sergeant Parker testified that defendant said on 15 June that "he would tell us what we wanted to know, but not then." On 17 June, Sergeant Parker testified that defendant replied affirmatively when asked "if he wanted to tell us what happened," and stated then that "[h]e didn't want an attorney, but he wanted to call his daughter." Sergeant Brown testified that after defendant used the telephone on 17 June "he sat back down and said he was ready to talk to us." This is sufficient to constitute an oral waiver.

[10] A refusal to sign a waiver form does not necessarily preclude a valid oral waiver. *State v. Simmons*, *supra*; *State v. Wright*, 274 N.C. 84, 161 S.E.2d 581 (1968); *United States v. Johnson*, 455 F.2d 311 (5th Cir. 1972); *United States v. Hopkins*, 433 F.2d 1041 (5th Cir. 1970), *cert. den.*, 401 U.S. 1013, 91 S.Ct. 1252, 28 L.Ed.2d 550 (1971); *United States v. Crisp*, 435 F.2d 354 (7th Cir. 1970), *cert. den.*, 402 U.S. 947, 91 S.Ct. 1640, 29 L.Ed.2d 116 (1971); *United States v. Thompson*, 417 F.2d 196 (4th Cir. 1969), *cert. den.*, 396 U.S. 1047, 90 S.Ct. 699, 24 L.Ed.2d 692 (1970); *Hodge v. United States*, 392 F.2d 552 (5th Cir. 1968). In *Thompson*, the Court of Appeals for the Fourth Circuit said:

> ". . . In view of Thompson's intelligence, his affirmative statement that he understood the explanation of his rights, and the voluntariness of his confession, we hold that his refusal to sign a written waiver did not render the confession inadmissible. [Citations omitted.]" *Id.* at 197.

In short, Judge McConnell has found defendant's confession voluntary and his waiver of constitutional rights the product of intelligence and understanding. These findings, supported by competent evidence, are, as we have said, conclusive on appeal.

[11-15] It was, we believe, error to permit interrogating officers Parker and Brown to testify "in their opinion" defendant understood his rights. Whether defendant understood is a question of fact which is capable of being proved and therefore must be proved if at all by his actual responses, verbal or otherwise, to the explanations given him of his rights. The officers are no better qualified to assess the understanding, or lack thereof, of a defendant than is the trier of fact. Therefore, the general rule prohibiting "opinion" testimony applies. "[O]pinion is inadmissible whenever the witness can relate the facts so that the jury [or trier of fact] will have an adequate understanding of them and . . . is as well qualified as the witness to draw inferences and conclusions from the facts." 1 Stansbury's N.C. Evidence § 124 (Brandis Rev.1973), and cases cited at n. 16. While lay opinion of the mental capacity of another is admissible in many instances, *id.* § 127, "[g]enerally . . . a witness may not give his opinion of another person's *intention* on a particular occasion." *Id.* § 129, and cases cited at n. 15. Similarly, we hold that a witness may not give an opinion as to whether a defendant in a criminal case *understood* his rights but must instead detail the facts upon which the opinion rests.

[16] There was, nevertheless, other competent evidence of defendant's understanding. The most telling is that defendant *attempted to exercise* his right to counsel on 15 June and, according to his evidence, again on 17 June. He also *exercised* his right to remain silent on 15 June. Also, Sergeant Brown testified that on 17 June defendant "*said* he understood the rights." (Emphasis added.) The question of defendant's understanding was for the trial court. We must presume the court based its finding on the competent evidence and ignored that which was incompetent. Where the court is the trier of facts, "in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence." *City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E.2d 111, 114-15 (1971). "[T]he court's findings of fact will not be reversed unless based only on incompetent evidence." *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 320, 182 S.E.2d 373, 377 (1971). Beyond a reasonable doubt this error was not prejudicial to defendant.

[17] Defendant further contends that error occurred when the trial court admitted that portion of his confession which states:

> "He left court about 10:30 Thursday morning. The judge had sentenced him to eighteen months for protecting his house against Mae Ruth. He had attorney Braddy appeal the case. . . ."

Defendant's exception to this portion of the confession is not properly supported by a specific objection. "[W]here only a portion of a witness' testimony is incompetent, the party moving to strike should specify the objectionable part and move to strike it alone." *State v. Pope*, 287 N.C. 505, 511, 215 S.E.2d 139, 144 (1975). *See also* 1 Stansbury's N.C. Evidence § 27 (Brandis Rev.1973).

[18, 19] Since this is a capital case, we will, nevertheless, consider the contention. *State v. Fowler*, 270 N.C. 468, 155 S.E.2d 83 (1967); *State v. McCoy*, 236 N.C. 121, 71 S.E.2d 921 (1952). Later in the confession, defendant states that "[h]e was so confused about the lies she told in court that he went in her grandmother's bedroom," where shortly the killing took place. This was evidence from which a jury could find that in defendant's mind he had been sentenced to eighteen months on account of lies told in court by the deceased. "Where evidence tends to prove a motive on the part of the accused to commit the crime charged, it is admissible, even though it discloses the commission of another offense by the accused." *State v. McClain*, 240 N.C. 171, 176, 81 S.E.2d 364, 367 (1954), citing *State v. Birchfield*, 235 N.C. 410, 70 S.E.2d 5 (1952). In *Birchfield*, evidence was held to be properly admitted that the victim of the assault being tried had, on a recent occasion, prosecuted the defendant for an earlier assault because "[t]his evidence had a logical tendency to show intent and motive on the part of the defendants." *Id.* at 415, 70 S.E.2d at 8. There was no error in admitting this portion of the confession.

Defendant next contends that the trial court erred in admitting his confession since it was taken at a time when he was represented by counsel, Mr. Braddy, whose presence he had not waived. Although again the record is not entirely clear, Mr. Braddy apparently represented defendant on 14 June in district court on the assault charge. On 15 June, defendant requested a chance to call Mr. Braddy. The police officer knew that defendant talked to someone but did not know whether it was Mr. Braddy or whether Mr. Braddy had agreed to represent defendant. According to defendant himself, testifying on *voir dire*: he did not call Mr. Braddy from the county jail but after his confession was made, Mr. Braddy came to see him in jail for the purpose of collecting a balance due on his fee for his representation on the assault charge. There was testimony that Mr. Braddy appeared for the defendant on 26 July 1973 to secure an order to have the defendant sent for a mental examination. Because of the time and nature of this appearance it would have little significance in determining whether Mr. Braddy represented the defendant on 17 June 1973.

[20, 21] Assuming that Mr. Braddy's representation of the defendant on the assault charge continued through 17 June, there was no denial of defendant's right to counsel in the murder case. A defendant may waive the presence of an attorney in a case under investigation when the attorney represents him on an unrelated charge. *United States v. Crook*, 502 F.2d 1378 (3rd Cir. 1974), *cert. den.*, 419 U.S. 1123, 95 S.Ct. 808, 42 L.Ed.2d 823 (1975); *United States v. Dority*, 487 F.2d 846 (6th Cir. 1973). *See also People v. Taylor*, 27 N.Y.2d 327, 318 N.Y.S.2d 1, 266 N.E.2d 630 (1971), which held that the New York rule that an accused, after indictment and arraignment, may not be questioned by police on those charges in the absence of counsel, applied only when the police or prosecutor knew that an attorney had been secured to assist the accused "*in defending against the specific charges for which he is held.*"

Defendant relies on *United States v. Hedgeman*, 368 F.Supp. 585 (N.D.Ill.1973). In that case, however, the officers misled the defendant into thinking that making a statement would help him and they also had actual knowledge that defendant was represented by counsel in the very case under investigation. There is no suggestion of clever misleading in this case, and as we have said, nothing in the record would sup-

port a finding that defendant was actually represented on the charges under investigation.

Judge McConnell has found upon competent evidence that defendant intelligently waived his right to counsel. Such a finding was not precluded even if defendant was represented by counsel on a charge unrelated to that under investigation. There is no showing of a denial of defendant's right to counsel under these circumstances.

[22] Defendant next argues that his constitutional rights were violated by the denial of his petition filed pursuant to G.S. 7A-454, for an order approving a fee to employ the services of a psychiatrist of his own choice to assist him in preparing for trial. It is not clear from the record whether in fact his motion was allowed by Judge Armstrong's order of 20 November 1973. It does not affirmatively appear who selected Dr. Proctor. Assuming the trial court and not defendant chose Dr. Proctor, defendant's constitutional rights were not thereby infringed. We are not called upon to address the question of whether an indigent defendant is constitutionally entitled, on a proper showing, to have the State provide him psychiatric assistance in the preparation of his defense. Defendant had that. G.S. 7A-454 provides only that "[t]he court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person . . . ." The statute permits but does not compel providing an expert to a criminally accused at State expense.

[23] The question presented is, consequently, whether an indigent who has been criminally accused and who has already been provided with two psychiatric experts at State expense, whose findings do not suggest that defendant is or has been legally insane or that he is incompetent to stand trial, and whose competency and standing in their profession have not been challenged, is entitled by reason of constitutional due process or equal protection to have the State furnish him still another psychiatrist selected by him. We have found no case that stretches the constitutional mandates this far and defendant has cited none. A number of decisions uphold the denial of an indigent defendant's request for an additional psychiatric expert of his own selection at state expense when the state has already provided competent psychiatric assistance from either state-designated physicians, *Utsler v. Erickson*, 315 F.Supp. 480 (D.S.D.1970), *aff'd*, 440 F.2d 140 (8th Cir. 1971), *cert. den.*, 404 U.S. 956, 92 S.Ct. 319, 30 L.Ed.2d 272 (1971); *McGarty v. O'Brien*, 188 F.2d 151 (1st Cir. 1951), *cert. den.*, 341 U.S. 928, 71 S.Ct. 794, 95 L.Ed. 1359 (1951); *Taylor v. State*, 229 Ga. 536, 192 S.E.2d 249 (1972); *Utsler v. State*, 84 S.D. 360, 171 N.W.2d 739 (1969); *Commonwealth v. Belenski*, 276 Mass. 35, 176 N.E. 501 (1931); or physicians practicing privately and selected by the trial court, *Barber v. State*, 248 Ark. 64, 450 S.W.2d 291 (1970); *Commonwealth v. Medeiros*, 354 Mass. 193, 236 N.E.2d 642 (1968), *cert. den.*, 393 U.S. 1058, 89 S.Ct. 699, 21 L.Ed.2d 699 (1969); *State v. Greenwood*, 197 Kan. 676, 421 P.2d 24 (1966); People v. Richardson, 192 Cal.App.2d 166, 13 Cal.Rptr. 321 (1961). Concerning an indigent's entitlement to expert assistance generally, see "Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert." Annot., 34 A.L.R.3d 1256 (1970).

We do not think defendant has been denied due process.

[24] Neither has defendant here, under the circumstances, been denied equal protection of the law. We held in *State v. Frazier*, 280 N.C. 181, 185 S.E.2d 652 (1972), *death sentence vacated*, 409 U.S. 1094, 93 S.Ct. 453, 34 L.Ed.2d 295 (1972), that an indigent defendant while entitled to competent counsel at State expense was "not entitled to have the court appoint counsel of his own choosing." *Id.* at 198, 185 S.E.2d at 663. If *Frazier* is sound constitutionally, and we believe it is, then *a fortiori*, an

indigent defendant on a proper showing of reasonable need is entitled by reason of constitutional equal protection to no more than having the State furnish competent psychiatric assistance.

Defendant, having been psychiatrically examined by a medical expert specializing in psychiatry at Cherry Hospital and by a privately practicing psychiatrist who we assume was selected by the trial court, has been assured an adequate opportunity to present his claims fairly. He has not been denied due process or equal protection by failure of the trial court to provide him without charge an additional psychiatrist of his own choosing. *See Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

[25] Defendant's next contention is that the court erred in allowing into evidence two photographs of deceased inasmuch as defendant stipulated the cause of death. This contention is without merit. The actual photographs were not made part of defendant's case on appeal. He argues, simply, that where the cause of death is stipulated in a homicide case, photographs of deceased are inadmissible since their only purpose would be to inflame and prejudice the jury. This argument misses the point that in a first degree murder case premeditation and deliberation may be proved circumstantially by showing the use of grossly excessive force, *State v. Buchanan, supra*, or by proof of the brutal manner of killing, *State v. Watson, supra*. A mere stipulation as to the cause of death may not necessarily convey to the jury full information as to the actual manner of killing. In such a case it is legitimate and often necessary to use testimony describing in detail the manner of killing, and photographs, properly authenticated, may be offered to illustrate this testimony. Defendant relies on *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889 (1963), in which the court found "an excessive use" of photographs in a case where the defense was that an accident occurred when the defendant and deceased began playing with a gun. *Foust* represents an exception to the general rule that photographs of a victim in a criminal case, when properly authenticated, may be offered to illustrate relevant testimony of witnesses even though the scenes portrayed are unpleasant or even gruesome to behold. *State v. Boyd*, 287 N.C. 131, 141, 214 S.E.2d 14, 20 (1975); *State v. Duncan*, 282 N.C. 412, 418, 193 S.E.2d 65, 69 (1972); *State v. Atkinson*, 275 N.C. 288, 311, 167 S.E.2d 241, 255 (1969), *death sentence vacated*, 403 U.S. 948, 91 S.Ct. 2283, 29 L.Ed.2d 859 (1971). The two photographs in question were properly authenticated by Officer Hicks who testified that they accurately depicted the deceased as he observed her when he arrived at the scene of the killing. They were properly admitted into evidence to illustrate the testimony of the witness.

The basis for decision there was ..... "ten gory photographs in color" of the deceased were introduced and each one explained in detail. This seemed to us to be

By his next assignment of error, defendant contends that the trial court erred in refusing to strike the testimony of State's witness Viola Suber, offered for the purpose of corroborating the testimony of Mrs. Lillian Patterson, when, in fact, Mrs. Suber's testimony did not corroborate that of Mrs. Patterson.

[26] "The admissibility of prior consistent statements of the witness to strengthen his credibility has been challenged by counsel and reaffirmed by the Court in scores of cases. Such evidence is admitted not only to rebut the implications arising from testimony as to prior inconsistent statements, but also where the witness's veracity has been impugned in any way." 1 Stansbury's N.C. Evidence § 51, pp. 146-47 (Brandis Rev.1973), and cases cited therein. *See* Section 52, *id.*, and cases therein cited for criticism of the North Carolina rule and the reasons for it. In *Lorinacher v. Talley*, 256 N.C. 258, 123 S.E.2d 477 (1962), Justice Bobbitt, later C. J., quoted with approval:

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"As stated by *Smith, C. J.*, in *Jones v. Jones*, 80 N.C. 246, 250: 'In whatever way the credit of the witness may be impaired, it may be restored or strengthened by this [proof of prior consistent statements] or any other proper evidence tending to insure confidence in his veracity and in the truthfulness of his testimony.' *Bowman v. Blankenship*, 165 N.C. 519, 81 S.E. 746; *Brown v. Loftis*, 226 N.C. 762, 764, 40 S.E.2d 421; Stansbury, *op. cit.* § 50. . . ."

See Gibson v. Whitton, 239 N.C. 11, 79 S.E.2d 196 (1953). Such previously consistent statements, however, are admissible only when they are in fact consistent with the witness's testimony. *State v. Bagley*, 229 N.C. 723, 51 S.E.2d 298 (1949); *State v. Melvin*, 194 N.C. 394, 139 S.E. 762 (1927); 1 Stansbury's N.C. Evidence § 52, pp. 150-51 (Brandis Rev.1973).

[27] If the previous statements offered in corroboration are generally consistent with the witness's testimony, slight variations between them will not render the statements inadmissible. Such variations affect only the credibility of the evidence which is always for the jury. *State v. Bryant*, 282 N.C. 92, 191 S.E.2d 745 (1972); *State v. Norris*, 264 N.C. 470, 141 S.E.2d 869 (1965); *State v. Case*, 253 N.C. 130, 116 S.E.2d 429 (1960).

[28] Applying these principles to the evidence in this case, we hold that it was not prejudicial error for the trial judge to refuse to strike Mrs. Suber's testimony offered to corroborate the testimony of Mrs. Patterson. Mrs. Suber's testimony, in the context of all the evidence, was not inconsistent with and not contradictory to the testimony of Mrs. Patterson. At most there was a slight variance which, when considered with all the evidence, could not possibly have prejudiced defendant. Mrs. Patterson testified, in summary, as follows: She, the deceased, and defendant were in her and defendant's residence on the morning of the killing when defendant and deceased began arguing. This argument was apparently a continuation of some previously existing controversy between deceased and defendant, which ended when deceased successfully prosecuted defendant that very morning in Forsyth District Court for an earlier assault upon her. While Mrs. Patterson was equivocal when asked if anyone else was in the house, she stated, "I couldn't tell who was in there because I couldn't swear because I didn't look under the bed." However, she never identified anyone else as being there. The clear import of her testimony was that no one else was present. She warned deceased and defendant that if they did not stop arguing she would leave. When the argument continued, she did leave the house. She then testified, "I wasn't out there no time." When defendant came out of the house she asked him, "What you done to Mae Ruth?" and he said, "Go in there and see about her, Mama." This testimony indicates that whatever had been done to Mae Ruth, defendant had done it. Consequently, Mrs. Suber's testimony that Mrs. Patterson told her that "George had told her to go in and see about her granddaughter; that he had hurt her, she was either hurt or dead," was not materially different in import from that of Mrs. Patterson.

Defendant never took the position at trial that he was not his daughter's assailant. On *voir dire* he simply said that he did not sign the confession and that it was forced out of him. He never, even on *voir dire*, denied the truth of it. All the testimony pointed unerringly to defendant as the killer. This assignment is overruled.

[29, 30] This Court on an appeal in a criminal action only reviews matters of law of legal inference, it not being the function of this Court to pass upon the credibility of witnesses or to weigh their testimony. North Carolina Constitution, Article IV, Section 12(1); *State v. Hance*, 268 N.C. 335, 150 S.E.2d 489 (1966); *State v. Neill*, 244 N.C. 252, 93 S.E.2d 155 (1956). The verdict in this case is fully supported by the evi-

dence. However, since the record discloses that the trial judge agreed to accept a plea of guilty of manslaughter, which defendant refused to enter, we commend the case to the Parole Commission for consideration of a recommendation for executive clemency.

An examination of the entire record discloses no error in law sufficient to constitute a basis for awarding a new trial.

No error.

SHARP, Chief Justice (dissenting as to the death penalty):

The murder for which defendant was convicted occurred on 14 June 1973, a date between 18 January 1973, the day of the decision in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated by Chief Justice Bobbitt in his dissenting opinion in *State v. Jarrette*, 284 N.C. 625, 666, 202 S.E.2d 721, 747 (1974)—an opinion in which Justice Higgins and I joined—, I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment. *See also* the dissenting opinion of Chief Justice Bobbitt, and my concurrence therein, in *State v. Waddell, supra* at 453 and 476, 194 S.E.2d at 30 and 47.

COPELAND, Justice, dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 437, 212 S.E.2d 113, 122 (1975).

EXUM, Justice (dissenting):

I concur in the majority's resolution of every issue addressed so ably in the opinion by Justice Moore. There is, however, a fundamental error in the trial judge's instructions to the jury, not addressed by the majority and not excepted to or assigned as error by the defendant, which, nevertheless, in my opinion, goes to the heart of this case and because of which I vote for a new trial. Since this is a capital case and the error as I perceive it highly prejudicial we should, under our long standing rule, take it up *sua sponte*. *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975); *State v. Fowler*, 270 N.C. 468, 155 S.E.2d 83 (1967); *State v. McCoy*, 236 N.C. 121, 71 S.E.2d 921 (1952).

While the majority correctly concludes there was sufficient evidence for the jury to find premeditation and deliberation, there is also evidence from which the jury could find the intent to kill, even if formed sometime before the act of killing and therefore premeditated, was not deliberated but was instead provoked by the deceased's refusal to leave the house as defendant ordered her to do, her incessant arguing, "talking back" to and cursing defendant. Indeed, this seems to be the essence of the contest at trial.

The only evidence of the manner of the killing and the events which immediately preceded it comes from the defendant's pretrial confession offered by the State against him at trial. This confession, it seems clear to me, is susceptible to two interpretations, either of which could have been reasonably adopted by the jury. One is that when defendant told deceased that "he would give her fifteen minutes to get out" of the house, he *at that time* determined that he would kill her if she didn't, got the meat cleaver from the kitchen, and deliberated the killing while he waited for the fifteen minutes to elapse. When deceased thereafter refused to leave he executed his previously formed and deliberated intent by killing her with the meat cleaver. Under this interpretation of his confession all of the elements of first degree murder are amply satisfied. It can also reasonably be inferred from his confession that defendant had no intent to kill the deceased when he demanded that she leave the house in fifteen min-

utes but that this intent was formed suddenly at the conclusion of the fifteen minute period and was provoked by deceased's fifteen minutes of argument and "back talking and cursing." The defendant could then have gotten the meat cleaver and killed the deceased in a fit of rage. Thus the crucial question for the jury in this case was whether defendant did indeed deliberate, as distinguished from premeditate, the killing or did he form the intent to kill during a sudden passion provoked by the deceased herself which precluded any such deliberation.

Regarding the element of deliberation the trial judge told the jury only that "the State must satisfy you . . . beyond a reasonable doubt . . . that the defendant acted with deliberation *which means that he acted while he was in a cool state of mind.*" (Emphasis supplied.) This bare bones definition of deliberation in the context of the evidence in this case was not sufficient. General Statute 1–180 requires the trial judge to "declare and explain the law arising on the evidence . . . ." How much the law needs to be explained depends on what evidence is presented. *State v. Cole*, 270 N.C. 382, 154 S.E.2d 506 (1967). Merely to define an element of a criminal offense may be an insufficiency which prejudices the defendant when that element is the very nub of the case. *State v. Lawrence*, 262 N.C. 162, 136 S.E.2d 595 (1964); *State v. Lunsford and Sawyer*, 229 N.C. 229, 49 S.E.2d 410 (1948). *See also State v. Thomas*, 118 N.C. 1113, 24 S.E. 431 (1896). Premeditation is a comparatively easy concept for the jury meaning simply some thought beforehand. Deliberation, however, in the context of this case, needs more careful elucidation.

Prior to 1893 there were no degrees of murder in North Carolina. In 1893 murder was divided into two degrees. First degree murder, punishable by death, consisted only of murder committed in the perpetration of another felony and murder which was premeditated and deliberated. All other murder was murder in the second degree. N.C. Pub.Laws 1893, ch. 85; *State v. Benton*, 276 N.C. 641, 657, 174 S.E.2d 793, 803, 804 (1970). In the very first case construing the new murder statute, *State v. Fuller*, 114 N.C. 885, 902, 19 S.E. 797, 802 (1894), this Court said:

> The theory upon which this change has been made is that the law will always be executed more faithfully when it is in accord with an enlightened idea of justice. Public sentiment has revolted at the thought of placing on a level in the courts *one who is provoked by insulting words* (not deemed by the common law as any provocation whatever) to kill another with a deadly weapon, with him who waylays and shoots another in order to rob him of his money, or poisons him to gratify an old grudge. (Emphasis supplied.)

Two years later in *State v. Thomas*, *supra*, the issue raised in the case now before us was squarely presented. In *Thomas*, defendant was convicted of first degree murder of his wife and sentenced to death. Testimony tended to show that he and his wife were in a fishing boat near Mason's Point on Bay River in Pamlico County. Witnesses heard screaming and sounds like a beating from the direction of the boat. They also heard defendant say, "If you don't hush I will take something and kill you" after which a "heavy lick" was heard. One witness saw defendant strike his wife and throw her overboard. Defendant returned in the boat alone. The next day her dead body was removed from the water in the area where she and her husband had been. A physician who did the post-mortem examination testified that she died of a broken neck, that she could not have drowned and that she was dead before she went into the water. This Court held that it was error entitling defendant to a new trial for the trial judge to have charged the jury "in such a way as might well have produced the impression on their

minds that they must convict of either murder [in the first degree] or manslaughter," *Id.*, 118 N.C. at 1124, 24 S.E. at 434, and "in omitting to explain to the jury the application of the testimony to the theory of murder in the second degree . . . ." *Id.* at 1127, 24 S.E. at 436. This Court said, *Id.* at 1124, 24 S.E. at 435:

> If [the jury] concluded that there was a quarrel or argument, and in the heat of sudden passion, engendered by disagreeable language, which would not have been provocation sufficient to bring the offense within the definition of manslaughter, the crime . . . was murder in the second degree.

In reaching this conclusion this Court analyzed the reason for the division of murder into two degrees and said, 118 N.C. at 1122, 24 S.E. at 434:

> The innate sense of justice implanted in the breast of every good man demanded that a *distinction should be drawn between cases where there was actual, though not legal, provocation, and those where a fixed purpose was shown*, whether from malignity or a mercenary desire for money. (Emphasis supplied.)

Thus *Thomas* added flesh to the concepts of premeditation and deliberation by pointing to the kind of provocation that might negate them.

Nine years later in *State v. Exum*, 138 N.C. 599, 617–18, 50 S.E. 283, 289 (1905) the two terms were separately analyzed:

> The two terms, "deliberate" and "premeditate," while frequently used in this connection as interchangeable, because, perhaps the facts do not always require that they should be spoken of separately, have not exactly the same meaning. "Premeditate" involves the idea of prior consideration, while "deliberation" rather indicates *reflection, a weighing of the consequences of the act in more or less calmness.* (Emphasis supplied.)

Although the trial judge explained the meaning only of premeditation, this Court found no error in *Exum* since in his definition of premeditation, he included concepts applicable to deliberation and specifically excluded "all idea of a killing from passion suddenly aroused," and directed the jury that before it could convict of a higher crime it must find that the killing was *"from a fixed determination, previously formed, after weighing the matter."* *Id.* (Emphasis supplied.)

Two years later this Court retreated slightly from its position in *Thomas* that any actual provocation could preclude deliberation. *State v. McDowell*, 145 N.C. 563, 59 S.E. 690 (1907). In *McDowell* an argument was provoked by defendant's companion with a train flagman. Defendant, sympathizing with his companion, prepared to do his part and readied his pistol. The Court characterized the fancied wrong to defendant as trivial in nature and refused to hold that if the defendant killed in revenge for the treatment his companion was receiving, it would only be murder in the second degree.

Two subsequent cases applied the *McDowell* limitation on provocation to situations where, objectively, the deceased did nothing to provoke the defendant to anger but instead tried to placate him. *State v. Coffey*, 174 N.C. 814, 94 S.E. 416 (1917); *State v. Benson*, 183 N.C. 795, 111 S.E. 869 (1922). In *Benson* prior definitions of deliberation were expanded, 183 N.C. at 798, 111 S.E. at 871:

> Deliberation means that the act is done in a cool state of the blood. It does not mean brooding over it or reflecting upon it for a week, a day, or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, sudden-

ly aroused by some lawful or just cause or legal provocation. *State v. Coffey*, 174 N.C. 814, 94 S.E. 416.

Although this definition of deliberation has been subsequently quoted by this Court many times, portions of it are only dictum in *Benson* and seem to me defective in two respects. First, the issue is not whether the intention to kill was *executed* while in a cool state of blood. To be sure a killing so executed has undoubtedly been deliberated. However, "[i]f the design to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect." 40 C.J.S. Homicide § 33d (1944). See *State v. Britt*, 285 N.C. 256, 262, 204 S.E.2d 817, 822 (1974). The true test is whether the intent to kill was at any time *considered*, or formed, in a cool, or deliberative, state of mind. Second, the provocation need not be "legal" nor the passion aroused by some "lawful or just cause." "Legal" provocation is what is required to reduce murder to manslaughter and a lawful or just cause for the killing would require an acquittal. The holding of *Thomas*, *Benson* and *Coffey* is that any actual provocation can preclude deliberation and reduce the crime to second degree murder provided it is more than trivial and directed toward defendant himself. I can find no case which holds to the contrary. That the true test of whether deliberation exists was not really changed by *Benson* is shown by *State v. Evans*, 198 N.C. 82, 85, 150 S.E. 678, 680 (1929) where this Court said, "The test is involved in the question whether the accused acted under the influence of ungovernable passion, or whether there was evidence of the exercise of reason and judgment."

In *State v. French*, 225 N.C. 276, 34 S.E.2d 157 (1945), this Court split on the meaning of the prior cases on deliberation. In *French* the killing occurred during an argument between the defendant and the deceased. Both majority and dissenting opinions agreed that the trial judge (Judge Bobbitt, later Chief Justice of this Court) was required to explain deliberation as distinguished from premeditation. Judge Bobbitt's instructions under consideration were:

> [T]he Court charges you that if the State has satisfied you from the evidence beyond a reasonable doubt that the defendant unlawfully killed Duck LeGrand with malice, and has further satisfied you from the evidence beyond a reasonable doubt that prior to the time the defendant inflicted upon Duck LeGrand the fatal wound, the defendant had formed a fixed purpose in his mind to kill her, and that, pursuant to that purpose he did kill Duck LeGrand because of the purpose in his mind, and not because of any legal provocation given him, then the Court charges you that if the State has so satisfied you from the evidence beyond a reasonable doubt, the defendant would be guilty of murder in the first degree, and it would be your duty to so find.

The majority approved these instructions and said they compared favorably to those approved in *State v. McClure*, 166 N.C. 321, 81 S.E. 458 (1914), which the Court quoted as follows:

> "Deliberation means to think about, to revolve over in one's mind, and if a person thinks about the performance of an act and determines in his mind to do that act, he had deliberated upon the act, gentlemen. Premeditation means to think beforehand, think over a matter beforehand, and where a person forms a purpose to kill another, and weighs this purpose in his mind long enough to form a fixed design to kill at a subsequent time, no matter how soon or how late, and pursuant to said fixed design kills said person, this would be a killing with premeditation and deliberation, and would be murder in the first degree. And the court charges you if you should find beyond a reasonable doubt, gentlemen, that prior to the time he killed the deceased,

he formed the fixed purpose in his mind to kill him, and that pursuant to that purpose he did kill the deceased because of the purpose in his mind, and not because of any legal provocation that was given by the deceased, then the court charges you that the prisoner would be guilty of murder in the first degree, and it would be your duty to so find."

Stacy, C. J., dissenting, was of the opinion that the instructions did not adequately deal with the concept of deliberation. He said:

> This charge as applied to the facts of the instant record fails to draw any distinction between a fixed purpose "deliberately formed" and one engendered from passion suddenly aroused. *State v. Thomas*, 118 N.C. 1113, 24 S.E. 431; *State v. Walker*, 173 N.C. 780, 92 S.E. 327. It sufficiently defines premeditation, but makes no reference to deliberation. *State v. Fuller*, 114 N.C. 885, 19 S.E. 797. "Premeditation" imports prior consideration, "thought of beforehand," while "deliberation" signifies reflection, "in a cool state of blood." *State v. Exum*, 138 N.C. 601, 50 S.E. 283; *State v. Evans*, 198 N.C. 82, 150 S.E. 678. It may not be necessary in every case to refer to the two terms separately, but both ideas are essential to a complete definition of the capital offense. *State v. Exum, supra; State v. Spivey*, 132 N.C. 989, 43 S.E. 475.

Four years after *French* was decided the legislature added the proviso to our murder statute (and all other capital crimes statutes) permitting juries in their discretion to fix the punishment at life imprisonment for first degree murder. N.C.Sess.Laws 1949, ch. 299, §§ 1–4. This proviso remained in effect until this Court in *State v. Waddell*, 282 N.E. 431, 194 S.E.2d 19 (1973) held that the decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) required that the proviso be nullified. After 1949 until our post-*Waddell* decision in *State v. Watson, infra*, my research reveals no significant discussion by this Court of the element of deliberation as distinguished from premeditation in first degree murder cases. Undoubtedly the ability of the jury in such cases to fix the punishment at life imprisonment reduced the significance of careful distinction between first and second degree murder in most cases. Since *Waddell*, however, first degree murder in North Carolina has been punishable only by death. Since the ratification on April 8, 1974, of Section 1, Chapter 1201 of the 1973 Session Laws, codified as N.C.Gen.Stat. 14–17 (1974 Cum.Supp.), murder in the second degree has been punishable by a maximum of life imprisonment.

Punishment for murder in North Carolina is now nearly the same as it was before 1949, first degree murder being punishable only by death and second degree murder by a term of years up to life imprisonment. (Prior to April 8, 1974, second degree murder was punishable by a maximum of thirty years imprisonment. N.C.Gen.Stat. 14–17 (1969)). Consequently the maintenance of a clear distinction between the two crimes has returned to its pre-1949 significance. Since *Waddell*, moreover, this Court has intimated that it would closely scrutinize the principal distinguishing feature—deliberation—both in terms of whether the evidence was sufficient to support a jury finding of its existence, *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975), and whether the concept was properly explained to the jury. *State v. Watson*, 287 N.C. 47, 214 S.E.2d 85 (1975). *State v. Thomas, supra*, was, in fact, quoted and analyzed at length in *Buchanan* and characterized as placing a "sound interpretation . . . upon the Act of 1893." 287 N.C. at 418, 215 S.E.2d at 86.

This case presents a close question as to the degree of defendant's culpability. The jury might well have returned a verdict of

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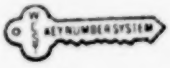
second degree murder had it been fully and properly instructed on the concept of deliberation and told specifically that if defendant's intent to kill was formed and executed during a passion suddenly aroused by the deceased's verbal abuse and not thereby deliberated he could not be convicted of first degree murder. I believe it was prejudicial error for the trial judge to fail first, to give a definition of deliberation which included this principle and second, to apply the principle to the facts in the case. I vote for a new trial.



APPENDIX C

Pages 72-78, Petition for Writ of Certiorari to the Supreme Court of Florida, Hallman v. Florida, No. 74-6168 (filed March 11, 1975).

the accused of a jury that is "truly representative of the community," Smith v. Texas, supra; see Carter v. Greene County Jury Commission, 396 U.S. 320, 330 (1970) -- is violative of petitioner's right to equal protection and due process.

c. The Exclusion of a Venireman with Conscientious Scruples Against Capital Punishment Deprives Petitioner of His Sixth Amendment Right to a Representative Jury.

This case also presents the significant constitutional question whether any death qualification of a jury is permissible in the wake of the incorporation of the Sixth Amendment's jury-trial guarantee into the Fourteenth. The Witherspoon decision was handed down only a few days after Duncan v. Louisiana, 391 U.S. 145 (1968); Witherspoon's trial, of course, long pre-dated Duncan; and the cases in which the Court has since applied Witherspoon have all been pre-Duncan cases or cases in which no Sixth Amendment challenge to the practice of death qualification was made. See Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); and the twenty-three cases reversed on authority of Witherspoon in 403 U.S. at 946-948 (1971). Prior to the effective date of Duncan (see Bellegfano v. Madden, 392 U.S. 631 (1968)), the only federal constitutional rights enjoyed by a state criminal defendant in connection with the selection of his trial jury were those vouchsafed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court had then recognized the obligation of the States not to exclude racial minority groups from the petit jury, see Smith v. Texas, 311 U.S. 128 (1940);

Hernandez v. Texas, 347 U.S. 475 (1954), but had not yet imposed upon state criminal trials the more exacting obligations of the Sixth Amendment. Compare Lovt v. Florida, 368 U.S. 57 (1961), with Taylor v. Louisiana, 43 U.S.L.W. 4167 (U.S., Jan. 21, 1975).

Since Duncan, however, the Court has recognized that the Sixth Amendment guarantee of jury trial entitles a state criminal defendant to "a petit jury [drawn] from a representative cross section of the community." Taylor v. Louisiana, supra, 43 U.S.L.W. at 4169. In Taylor -- which marks only the latest exemplification of this principle[66/] -- the Court held that a male criminal

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66/ Between the dates of Duncan and Taylor, the Court clearly said several times that the selection of petit jurors from a representative cross section of the community was an essential requirement of the Sixth Amendment. In Carter v. Greene County Jury Commission, 396 U.S. 320, 330 (1970), the Court suggested that such a requirement was imposed upon the States by Duncan, stating that the "very idea of a jury" was that of a "'body truly representative of the community'" (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)) and that jury lists must "'reasonably reflect a cross-section of the population,'" 396 U.S. at 332 (quoting Brown v. Allen, 344 U.S. 443, 474 (1953)). See also Williams v. Florida, 399 U.S. 78, 100 (1970); Apodaca v. Oregon, 406 U.S. 404, 410 (1972); and see Peters v. Kiff, 407 U.S. 493, 502-504 (1972) (opinion of Mr. Justice Marshall).

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defendant had standing to contest the exclusion of women from his trial jury without the necessity of demonstrating any specific prejudice because the exclusion of a distinctive population group "deprived him of the kind of fact finder to which he was constitutionally entitled." Id. at 4168. 67/

67/ "We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against exercise of arbitrary power -- to make available the common-sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . . The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

Taylor v. Louisiana, supra, 43 U.S.L.W. at 4170.

As the Court has progressively clarified the nature of the "jury" guaranteed in state criminal proceedings by the Sixth Amendment, the cross section requirement has become increasingly essential and the permissibility of death qualification has therefore become increasingly suspect. Williams v. Florida, 399 U.S. 78 (1970), held that a jury of twelve was not an indispensable part of the Sixth Amendment right: all the Sixth Amendment required was that the jury be large enough "to provide a fair possibility for obtaining a representative cross-section of the community . . . " Id. at 100. This was so because the critical function of the jury was to provide a citizen group, representative of the community, which would serve to check possible Government oppression of criminal defendants. "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." Ibid. In Apodaca v. Oregon, 406 U.S. 404, 410 (1972), the Court similarly ruled that the Sixth Amendment did not require conviction by unanimous verdict in State criminal cases, since the jury's function could be served without unanimity "as long as it consists of a group of laymen representative of a cross section of the community."

The principle that no identifiable group may be systematically excluded from jury panels is not limited to groups defined by race, of course. See Taylor v. Louisiana, supra;

White v. Crook, 251 F. Supp. 401, 408-409 (M.D. Ala. 1966) (exclusion of women); Labat v. Bennett, 365 F.2d 698 (CA5 1966), cert. denied, 385 U.S. 991 (1967) (exclusion of wage earners); State v. Schowgurow, 240 Md. 121, 213 A.2d 475 (1965) (exclusion of agnostics and atheists).

> "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

Hernandez v. Texas, 347 U.S. 475, 478 (1954). As the Court reiterated in Apodaca v. Oregon, supra, 406 U.S. at 413, the Sixth Amendment forbids "systematic exclusion of identifiable segments of the community from jury panels," because all groups have "the right to participate in the overall legal processes by which criminal guilt and innocence are determined." And the Court plainly recognized in Witherspoon that jurors with scruple against the imposition of the death penalty form a distinctive, coherent and sizeable group in most communities from which juries are selected. 68/

68/ See also, e.g., Bronson, On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. COL. L. REV. 1 (1970); Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 STAN. L. REV. 1245 (1974).

Since a veniremen was excluded from petitioner's post-Duncan trial jury on the sole ground of her conscientious scruple against the death penalty, the issue is presented here whether such an exclusion may be justified under the exacting standards of the Sixth Amendment. Admittedly, a defendant cannot object under the Sixth Amendment to the exclusion for cause of veniremen who are related to him or who have a monetary interest in the outcome of his suit, because of the danger that such veniremen, if selected as jurors, would bring to the jury's deliberations attitudes that are inconsistent with their proper duty as jurors to determine the truth impartially. Under a statutory scheme like Florida's,however, it is the rightful duty of the jury to express community attitudes about punishment: "one of the most important functions any jury can perform [in the administration of such a statute] . . . . is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Witherspoon v. Illinois, supra at 520 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Indeed, the Florida capital punishment statute implicitly contemplates the expression of a broad range of community sentiment regarding punishment, since it provides for a recommendation of sentence by a "majority of the jury," Fla. Stat. §921.141(3), and allows the trial judge to overrule this "recommendation," ibid. It would thus have been impossible for Veniremen Miller to have "hung" the jury on the issue of sentence (assuming even that she

adamantly refused to vote in favor of the death sentence -- an assumption not justified by the voir dire record, see pp. 61-67, supra); and the vote of a majority of the jury to recommend life imprisonment would itself not have precluded the trial judge's imposition of a death sentence.[69] The Court should determine, therefore, whether in this setting a criminal defendant is entitled by the Sixth Amendment to a jury panel which reflects a fair cross section of community sentiment -- a panel from which veniremen such as Mrs. Miller cannot be excluded for cause simply on account of their views regarding capital punishment.

69/ Jury recommendations of mercy have not forestalled the imposition of the death sentence in at least 16 cases. See note 13, supra.